APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 4
HCA/2025/000557/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CM

Respondent

Appellant: Edwards KC, AD; the Crown Agent
Respondent: Mackintosh KC, Simpson; Patterson Bell, Solicitors

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30 January 2026

Introduction

[1] The Crown appeals against sentence on two grounds following a jury at Perth Sheriff Court convicting the respondent of charges 1, 2, 7 and 8 on the indictment, on 21 August 2025, and the sheriff passing sentence on 2 October 2025. First, that the sentence imposed on

charge 2, imprisonment for 3 years, was unduly lenient and, secondly, in declining to make a sexual harm prevention order on charges 7 and 8, the sheriff erred and, by failing adequately to protect the public, passed an unduly lenient sentence.

[2] The charges were these:

> "(001) on various occasions between 25th October 1982 and 21st January 1993, both dates inclusive at [various addresses in Dundee] you [CM] did assault your daughter, [AA when she was aged between 5 and 15]… and did repeatedly slap or punch her on the head and body, kick her on the body and pull her by the hair all to her injury;
>
> (002) on various occasions between 25th October 1984 and 24th October 1988, both dates inclusive at [at two addresses in Dundee] you [CM] did use lewd, indecent and libidinous practices and behaviour towards your daughter, [AA when she was aged between 7 and 10] … and did penetrate her vagina with your fingers and her anus with clothes pegs or similar objects, to her injury, utter sexual remarks to her, touch her on the body and vagina, over and under her clothing, masturbate your penis in her presence (sic);
>
> (007) on various occasions between 1st January 2022 and 5th August 2022, both dates inclusive, at [addresses in Arbroath] you [CM], did sexually assault [BB when she was aged 13 and 14] … in that you did touch her on the thigh and buttocks over her clothing and throw pieces of paper at her chest;
> CONTRARY to Section 3 of the Sexual Offences (Scotland) Act 2009;
>
> (008) on 4th August 2022 at [an address in Aberdeenshire] you [CM], a person who had attained the age of 16 years, did intentionally and for the purposes of obtaining sexual gratification or of humiliating, distressing or alarming [BB then aged 14] …, a child who had attained the age of 13 years but had not attained the age of 16 years, send a written sexual communication to her in that you did send her messages via social media requesting that she send you nude images and utter inappropriate remarks to her;
> CONTRARY to Section 34(1) of the Sexual Offences (Scotland) Act 2009."

[3] The sheriff sentenced the respondent to the following periods of imprisonment:

- 12 months on charge 1
- 36 months on charge 2
- 4 months on charge 7 and
- 2 months on charge 8.

The sentences on charges 1 and 2 were concurrent with each other. Those on charges 7 and 8 were also concurrent with each other but consecutive to the sentence on charge 2. Accordingly, the respondent's total sentence was imprisonment for 40 months.

Background

[4] The complainer on charges 1 and 2 lived with her father, the respondent, and her mother until she was 12, when she was taken into care. She had a younger brother and sister. The family lived at various addresses in Dundee. Her parents drank heavily, prompting social work involvement with the family. A stage was reached when the complainer was at residential school through the week, returning home at the weekend. She complained to the police in 2021.

[5] On charge 1, the complainer said that the respondent smacked and kicked her from when she was 5 or 6 years old and would sometimes punch her. He would kick her on the legs and bottom, slap her on the face and smack her on the bottom. When she was 14 or 15 he pulled her hair so hard that she lost some hair. She reported it at school the following day and did not return home again. The sentence on charge 1 is not subject to appeal.

The circumstances of the offences under appeal

Charge 2

[6] When she was 7 or 8 and her mother was out working, the respondent touched and rubbed AA's chest and vagina over her clothing. He told her it was their secret, and she must not tell her mother. This pattern was repeated and could go on for 10-30 minutes. He then began to do it when she was naked, probably when she was 9 or 10. He would remove her clothes himself or tell her to remove them. He would then touch her chest, vagina and

anal passage with his fingers. Sometimes he would insert his fingers into her vagina. He also inserted clothes pegs into her anus for 5-10 minutes each time and she would feel thrusting and twisting, causing her pain. She said it was very sore and he told her she had to be brave. He would be wearing clothes but touching his genitals. She now understands he was masturbating. He told her that girls needed sex, it was a part of life that he had to teach her. She must not tell her mother or social workers as it was "our little secret." It only happened when her mother was out at work, about once a week, and sometimes more frequently.

[7] It caused her difficulty with her bowels. She would lose control and soil herself most nights. She would smear her faeces on the walls or hide it under her bed. It stopped when she was ten and a half or 11 years old when she moved school, on 24 October 1988, after which there were no more entries about soiling in social work records. Medical examinations in May and June 1988 revealed injuries that could be explained by playing, and her hyperactivity, and it was not clear that she had been abused, although physical abuse was probable.

Charges 7 and 8

[8] BB was a friend of the respondent's granddaughter, CC. The timing of charge 7 began shortly before BB turned 14, and continued for a further 7 months, and the conduct in charge 8 occurred at the end of that period. On one occasion BB visited CC at an address in Arbroath. The respondent was there and he threw paper down the tight vest top she was wearing. It went down her cleavage and the respondent immediately left to go to the toilet. On another occasion, at the same house, the respondent sat beside her and grabbed her thigh. Later that day, he grabbed her bottom twice, once while pretending to be playing a

game. A few days later, the respondent messaged BB and asked her to send him pictures of herself naked, asking her if she knew what a "birthday suit" was. BB asked him why he was asking her this and he told her to "try and guess". When she asked him whether he meant that he wanted to see her "in nothing," he replied, "What do you think?" followed by "Yea." She asked him whether he was joking. He replied that he was not. When BB prevaricated, to resist his request, he persisted by asking her whether she would, "do it just top half." In a later exchange, BB confronted the respondent by saying "I am 14 u are 69 I think it is very wrong u are asking me for nudes." When she asked him why he asked her for nude photographs he replied, "just silliness."

Victim information

[9] AA explained that she suffers from ongoing bowel problems, including diverticulitis and rectal bleeding. She suffers from anorexia and has used drugs and alcohol to cope. She has taken an overdose on several occasions in attempting to commit suicide. She had a heart attack immediately after giving evidence at trial and was admitted to hospital for four days. She has PTSD with regular nightmares such that she has been unable to work for almost 30 years. Her difficulties have had a profound impact on her relationship with her husband and child. She could not stay where she grew up and her move to another part of Scotland left her isolated.

[10] BB was 16 when she prepared her victim statement. She is less happy than she used to be and has struggled to communicate her feelings. She feels uncomfortable being touched or hugged even by female friends. She suffers from flashbacks and nightmares and has had counselling for two years.

Previous convictions

[11] The respondent has seven convictions on summary complaint between 2004 and 2013. Five relate to minor motoring offences. He has two convictions for assault, both in the domestic context. He was fined in 2010 and made subject to probation for 3 years in 2011.

Justice social work report and risk assessment

[12] The author assessed the respondent as posing a below-average risk of sexual recidivism and a medium risk of general reoffending. He continued to deny the offending and blamed others for his actions. Whilst he admitted the conduct in charge 7, he denied any sexual intent. He denied that he asked BB for nude photographs, maintaining that reference to a "birthday suit" was part of a joke that the complainer did not understand. The respondent did not disclose any significant negative experiences in his personal life. He acknowledged that the environment in which he brought up his children was sometimes chaotic, attributing it to his wife's use of alcohol. The author noted that the respondent posed a significant risk to children.

[13] A Tay Project assessment was that the respondent's risk of sexual and violent recidivism was below average. He was assessed as suitable for the Moving Forward 2 Change programme, a behavioural change programme intended to reduce the risk of re-offending by men convicted of sexual offences.

Plea in mitigation

[14] The respondent was 73 when sentence was passed, single, retired and reliant on state benefits (although we note from the JSWR that he is in receipt of both a private and state pension). The lack of insight referred to in the reports was due to a lack of education. The

respondent had found probation helpful and was willing to undertake work to identify and manage inappropriate behaviours.

Reasons for the sentence imposed

[15] The sheriff considered that only a prison sentence was appropriate, given the nature and severity of charge 2. It was not open to her to impose an extended sentence for offending occurring before 30 September 1998: when section 86(1) of the Crime and Disorder Act 1998, amending the Criminal Procedure (Scotland) Act 1995 by introducing section 210A, came into force. The sheriff considered the reasoning and conclusions of this court in sustaining a Crown appeal in *HM Advocate* v *B(C)* [2023] HCJAC 4, 2023 JC 59 for offending bearing some similarities but occurring over a period more than twice as long as that in charge 2. Given the shorter period and the respondent's age, she considered the sentence she imposed on charge 2 appropriate.

[16] The prosecutor invited the sheriff to make a sexual harm prevention order with conditions prohibiting the respondent from: (i) attempting to have contact with any child under the age of 18 unless supervised by an adult over the age of 21, and (ii) undertaking or applying for any work or activity, whether paid or voluntary, that was likely to bring him into contact with a child or young person under the age of 18 years without prior written permission from the relevant police public protection unit. The sheriff was not satisfied that this was necessary. On release from prison for a sexual offence, the respondent would be subject to licence conditions capable of protecting the public from any risk he posed. The indication in the reports was that he could be managed in the community.

Note of appeal

[17] The sentence imposed on charge 2 was unduly lenient because the sentence did not sufficiently achieve the sentencing purposes of expressing disapproval of sexual offences involving young children, particularly those involving breach of parental trust. The sheriff failed to give sufficient weight to AA's age at the time of the offence, the significant physical and psychological harm he caused her, the breach of parental trust and the inherent seriousness of the offence. There was a considerable difference between the sentence imposed and the sentence likely to have been imposed in England and Wales under reference to the Sentencing Guidelines for England and Wales for section 6 of the Sexual Offences Act 2003, assault of a child under 13 by penetration of the vagina or anus, which would attract a sentence in the range of 13 to 19 years with a starting point of 16 years' imprisonment. The sentence imposed did not address the significant risk of harm posed by the respondent. The sheriff placed undue weight on the assessments in the reports, failed to consider the whole scope of the respondent's offending and failed to protect the public, notably children, from the risk he presents. The sheriff erred in failing to impose an SHPO.

Submissions

Crown

[18] The sentence on charge 2, and the failure to impose an SHPO, fell outside the range of sentences that the sheriff, applying her mind to all relevant factors, could reasonably have considered appropriate: *HM Advocate* v *Bell* 1995 SCCR 244 at 250D.

[19] The sheriff did not reflect the gravity of the respondent's culpability in the sentence imposed. There was clear evidence of planning, premeditation and grooming. His conduct took place in private and escalated from touching and rubbing to digital penetration of AA's

vagina and "thrusting" or "twisting" clothes pegs into her anus, causing extreme pain. He did this, repeatedly, for his own deviant sexual gratification. He knew the extent of AA's pain and discomfort but, instead of stopping, he told her to "be brave." He told her not to tell anyone and that it was their "little secret".

[20] The harm he caused AA was at the highest level, both psychologically and physically: *HM Advocate* v *RB* [2025] HCJAC 7, 2025 JC 302 at [24]. The complainer suffered from rectal bleeding and excessive soiling, conditions known to the respondent at the time of the offending. The psychological harm caused has continued through AA's adult life, as detailed in her victim statement.

[21] The respondent's actions were a breach of the sacrosanct bond of trust between parent and child: *RB* at para 22. The court had previously held that a significant prison sentence, at least in the region of 8-10 years, may be appropriate where an offence involved the rape of a complainer, or other penetrative sexual abuse of several complainers, in respect of whom the offender was in a position of trust: *HM Advocate* v *Collins* [2016] HCJAC 102, 2017 JC 99. Whilst the sheriff clearly identified breach of trust in referring to *B(C)*, she erred by placing too little weight on it. The sheriff should have distinguished this case, given penetration by an object. The respondent specifically targeted AA at times when he was her primary carer, her mother being out at work. His offending was further aggravated by the repetition and persistence of his conduct over four years. Repetition usually makes a crime more serious, certainly in cases of sexual offending: *HM Advocate* v *MacGregor* [2025] HCJAC 28; 2025 JC 358 at [32]; *HM Advocate* v *JT* 2005 1 JC 86 at [45]; *HM Advocate* v *Cooperwhite* [2013] HCJAC 88, 2013 SLT 975 at [11] and [16].

[22] The community strongly disapproves of sexual offending against children. It is regarded as particularly odious: *A* v *HM Advocate* [2015] HCJAC 105, 2016 SLT 26 at [24]. There were few, if any, mitigating factors.

[23] On a cross-check against the English and Welsh Guidelines for s 6 of the 2003 Act, the offence might fall within harm category 1 and culpability category 1. This would result in a starting point of 16 years' imprisonment, within a range of 13-19 years. There was a major disparity between the sentence selected by the sheriff and the range in the English and Welsh Guidelines. Such a major disparity could confirm that the sentence was unduly lenient: *HM Advocate* v *AB* [2015] HCJAC 106, 2016 SCCR 47 at [13]; *HM Advocate* v *Docherty* [2024] HCJAC 36, 2025 JC 31 at [20]. Even if the range was so far removed from sentencing practice in Scotland that it should be disregarded, this court should note that in *B(C)*, the court had examined the English guideline for a different offence, section 25 of the 2003 Act. On reflection, it would be appropriate to evaluate the respondent's sentence against the section 25 guideline.

Sexual harm prevention order

[24] It was open to the court to impose an SHPO where it was satisfied that it was necessary to make an order for the purpose of protecting the public, or any particular members of the public, from sexual harm: Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 11(4)(a). It was evident that the public, and in particular children, required protection from the respondent. There were separate courses of conduct against two different complainers, separated by a generation. Each course of conduct only ceased when the respondent no longer had the opportunity to offend: in AA's case because she was removed from his care and for BB when she disclosed his offending. The author of the

JSWR considered that the respondent posed a significant risk to children and recommended numerous restrictions to ensure he would not have contact with any persons under the age of 18 years. Ordinary licence conditions were not sufficient to protect the public from the risk posed by the respondent. Where an extended sentence was not competent on charge 2, the sheriff should have made an SHPO to protect children from sexual harm. The test was plainly met.

[25] Having considered the respondent's written submissions, and that he will be subject to notification requirements indefinitely and that details of his convictions were referred to the Scottish Ministers under the Protection of Vulnerable Groups (Scotland) Act 2007 for consideration of inclusion of his name in the list of persons unsuitable to work with children, and his age and status as a pensioner, the Crown was content that only one restriction was necessary. It should also be qualified for the reasons founded on by the respondent.

Respondent

[26] The sentence selected by the sheriff was not unduly lenient. The sheriff had regard to relevant and recent sentencing decisions in similar cases. The facts and circumstances of *B(C)* were broadly analogous to this case. Both cases were prosecuted in the Sheriff Court and involved the breach of trust by a father towards his daughter. The complainers in each case were under 13. In *B(C)*, the abuse continued for much longer than the respondent's abuse of AA. In both cases the offenders impressed upon the complainers the importance of not disclosing what was taking place. The sheriff correctly adjusted the sentence imposed in *B(C)* to reflect the circumstances of the present case. She correctly identified that the abuse had not been as prolonged as that in *B(C)* and took account of the respondent's advanced

age. The sheriff could not be faulted for selecting her sentence, given the Scottish authorities. Whilst the English and Welsh Guidelines could be used as a broad cross-check, they were not to be applied in a rigid or mechanistic fashion: *Sutherland* v *HM Advocate* [2015] HCJAC 115, 2016 SLT 93. The court in *B(C)* had regard to the English and Welsh Guideline for s 25 of the 2003 Act, which the sheriff took account of. The circumstances in *RB* and *Collins*, involving rape, were substantially worse than those of the respondent's case. That the Crown chose to prosecute the respondent in the Sheriff Court was a consideration that could not be overlooked: *HM Advocate* v *Stalker* 2003 SCCR 734 at [13].

[27] The sheriff was correct to refuse the Crown's motion for an SHPO to be imposed in the terms presented to her. The first prohibition, of the respondent having contact or attempting to have contact with any child under the age of 18 years unless supervised by an adult over the age of 21, was too broad. It would have prevented the respondent from using shops and public transport where staff and customers may be under the age of 18: *R* v *Smith* [2011] EWCA Crim 1772 at [24]. Such a prohibition required to be compatible with Article 7 of the European Convention on Human Rights and Fundamental Freedoms by being sufficiently precise to enable the offender to understand its scope and foresee the consequences of his actions so that he could regulate his conduct without breaking the law: *R (Purdy)* v *Director of Public Prosecutions* [2009] UKHL 45, [2010] AC 345 at [40]. A blanket prohibition of any contact in any form with a child under the age of 18 years would have cut the respondent off from society and everyday living. The second prohibition against undertaking or applying for any work or activity likely to bring him into contact with a child without prior written permission, was unnecessary. The respondent was 73 years of age and in receipt of a private pension. There was no prospect that he would seek further employment.

[28] The respondent accepted that if a modification were made to prohibit contact with children under 16 years, and it included an exempting qualification of the kind identified in *Smith*, for inadvertent contact with children, then it would be appropriate for this court to make an SHPO for a period of 10 years in light of the respondent's conduct in charges 7 and 8. Senior counsel accepted the court's provisional view that the terms of any order should properly address the specific risk of grooming via electronic communications.

Decision

[29] The circumstances and consequences of charge 2 were appalling and the sentence imposed appears conspicuously lenient. Nevertheless, it does not automatically follow that the sentence passed on that charge was unduly lenient. Parties agreed that we should apply the approach of the Lord Justice General (Hope) in *Bell*. In that case, the court was considering the Criminal Procedure (Scotland) Act 1975 section 228A, introduced from 1 October 1993 by the Prisoners and Criminal Proceedings (Scotland) Act 1993 s 42. This provision, for the first time, allowed the Lord Advocate to appeal against a sentence on the ground that it was unduly lenient. The Lord Justice General explained:

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Weight must always be given to the views of the trial judge, especially in a case which has gone to trial and the trial judge has had the advantage of seeing and hearing all the evidence. There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it at the request of the Lord Advocate."

[30] In considering whether to invoke a jurisdiction introduced for the first time in 1993, and which continues to allow the Crown direct access to an appeal hearing without

requiring leave to appeal, the Crown should exercise the highest standards of care in selecting cases to be brought before this court: *HM Advocate* v *McKay* 1996 JC 110, opinion of the court delivered by the Lord Justice General (Hope). The Crown should take equal care in formulating grounds of appeal: *HM Advocate* v *Bennett* 1997 JC 49, *McKay*.

[31] In Scotland, unless the court has approved a Scottish Sentencing Council offence guideline, then the primary source of guidance for a sentencer is Scottish precedent in reported appeal cases; *Collins* at para 30. Even then, the court must always be astute to recognise that the circumstances of different cases are never identical and that considerable care and judgement is required in evaluating potential precedents. In some cases, particularly where there is a dearth of Scottish authority, the English guidelines may prove useful. Such consideration should always be very carefully undertaken. If they are considered at all, English guidelines should generally provide no more than a cross-check on what the judge has provisionally considered to be the appropriate sentence. They may be most useful where the offence is regulated by a UK statute and has a common maximum sentence. They should not be applied in a rigid or mechanistic fashion, given the differences in sentencing practices and regimes: *Sutherland,* opinion of the court delivered by the Lord Justice Clerk (Carloway) at para 20.

[32] There is an obvious difference in this case. Both the common law crime constituting charge 2, and its contemporary equivalent, sexual assault by penetration of a young child (under 13 years), section 19 of the Sexual Offences (Scotland) Act 2009, have the same potential maximum of a life sentence. In England the offences under ss 6 and 25 of the 2003 Act carry, respectively, maximum sentences of life imprisonment and 14 years' imprisonment (the latter for an offender of 18 years or over). The offence under s 25 (sexual activity with a family member constituted by any kind of sexual touching) is not found in

the same terms in Scots law, but as the Advocate Depute came to recognise, the range of sentences for s 25 are much closer to Scottish sentencing practice than those for a 2003 Act section 6 offence (assault of a child under 13 years by penetration).

[33] Whilst the Crown identified certain precedents, including *RB, Collins* and *JM* v *HM Advocate* [2019] HCJAC 9, the Advocate Depute acknowledged that the circumstances in those cases were rather different. In *Collins*, the respondent worked in a young person's unit and was convicted of repeatedly and forcefully raping one girl and in the case of each of three other complainers, an instance of indecent assault by kissing and sexually touching. His offending extended over a period of 11 years. It appears that the girls were aged between 12 and 16 years. In *RB*, the respondent, during contact, violently raped his 10 year-old daughter, who forcefully resisted and protested. He had locked her in the house to prevent her from escaping. On another occasion, when he had contact with his son, aged 4 or 5 years, and while they were out alone for a walk, he told the boy to bend down, lower his underwear and the respondent pulled down his own clothing and exposed his penis. The child panicked, thinking his father was going to urinate on him and kill him, and quickly pulled up his clothing, bringing the incident to an end. In *JM*, the appellant, whose sentence was reduced on appeal from 10 to 6 years' imprisonment, had sexually abused three daughters some 30 years previously between 1976 and 1990. His conduct extended for 10 years in one case against a daughter from the age of 4 years; for 6 years for a second daughter from the age of 8 years; and for 6 or 7 years for a third daughter from the age of 5 years. His conduct mostly involved rubbing and touching their vaginas, pressing his penis against their buttocks, ejaculating, masturbating, inducing them to masturbate him and, on one occasion digitally penetrating the second daughter's vagina. The appeal court noted the

respondent's exemplary conduct in the intervening years, his poor health and that there was one penetrative act. He had a new and supportive family.

[34] We reject the respondent's suggestion that the sheriff was constrained, to any extent, by the maximum sentence available to her being imprisonment for 5 years. If she had considered that justice required a greater sentence, the appropriate course would have been to remit to the High Court of Justiciary: Criminal Procedure (Scotland) Act section 195. The Crown's choice of indicting in the Sheriff Court does not create a presumption that a sentence of imprisonment for 5 years or less is appropriate: *Stalker*; *McGhee* v *HM Advocate* [2006] HCJAC 87, 2006 SCCR 712. In delivering the opinion of the court in *Stalker*, the Lord Justice Clerk (Gill) explained, at para 13:

> "…in every case the decisive consideration should be the level of sentence that the sheriff considers to be appropriate and not the level that the Crown's choice of forum may be thought to indicate. We do not agree that a remit would be appropriate only where unexpected evidence takes the disposal beyond the sheriff's powers. A remit will be appropriate if the sheriff considers that the circumstances require it, regardless of the view that the Crown has taken. In our view, a sentence within sheriff court limits was not an option in this case..."

[35] The opinion of the court in *B(C)* was relevant as the sheriff correctly recognised. It remains relevant in this appeal given this court's task as explained by the Lord Justice General in *Bell*. In *B(C),* the court examined, closely, all relevant circumstances before reaching a fully reasoned decision on increasing a sentence of imprisonment from 2 years to 4 years. We shall examine the court's opinion in some detail.

[36] The respondent B, was indicted on two charges of lewd, indecent, and libidinous practices and behaviour against his own daughters during the 1980s and 1990s. After their parents separated, the two complainers lived with the respondent. There was regular sexual abuse including digital penetration of the vaginas of both complainers. The abuse of the first complainer had started when she was 2 or 3 years

old and endured over 10 years. He also pinned her down, lay in bed naked with her and caused her to touch his erect penis. On one occasion, in anger, he roughly penetrated her vagina with his fingers causing considerable pain. Charge 2 included lying, both naked, on a mattress with the second complainer and penetrating her vagina with his fingers. These occurrences were less frequent. He groomed his daughters and normalised his abusive behaviour. He repeatedly told them they could be taken away if they told people about what was happening at home. His sexual conduct sometimes occurred with both girls at once so that each witnessed the other being subjected to what they later came to understand was sexual abuse.

[37] The complainer on charge 1 looked back and could see how her whole life had been affected. She had difficulties in maintaining relationships and sustaining employment. She suffered nightmares, insomnia, flashbacks, mood swings and suicidal ideation. She had required counselling and suffered two extreme episodes of mental health difficulties that necessitated the support and intensive care of a mental health crisis team.

[38] The sheriff took account of positive references, the absence of any meaningful convictions, the passage of time between the commission of the crimes and sentencing and the respondent's work history. The respondent suffered from Ménière's disease, anaemia, high blood pressure, heart disease, diverticular disease and issues affecting his digestive tract. The sheriff imposed concurrent sentences of imprisonment: two years on charge 1 and one year on charge 2. The Crown restricted its challenge to charge 1 and, with reference to the Sentencing Council for England and Wales guideline *(Sexual Activity with a Child Family Member/Inciting a Child Family Member to Engage in Sexual Activity),* suggested a starting point of 6 years in a range of 4 to 10 years.

[39] In evaluating the circumstances, the court noted that there was very high culpability for such deliberate and planned sexual abuse committed by a mature adult. The harm caused was enormous. The respondent's offending was sustained and repeated and had immense psychological impact. Other particularly aggravating features were the vulnerability of a child in his sole care whom he specifically targeted. It was an egregious breach of the very high degree of trust placed in a parent. There was grooming, psychological manipulation and threats about the consequences of the child reporting what he was doing. The respondent had sought to normalise his behaviour as if it was a game. The commission of such offending in the presence of another child was a further aggravation. There was no convincing evidence of remorse, regret, insight or victim empathy. Whilst the respondent's good character was mitigating, it was of very limited weight. He evaded detection and enjoyed life as if a respectable citizen for many years. That he was now old, and had health difficulties, carried little weight. He would receive all necessary medical care whilst in prison. The court concluded that the sheriff had underestimated the gravity of the offence, the sentence was unduly lenient and imposed instead a sentence of 4 years' imprisonment.

[40] Returning to the present case, we recognise the significance of the many serious and aggravating features we have set out above. Both culpability and harm were very high in this case, the harm perhaps being even worse than in *B(C)*. The breach of trust was egregious, and the respondent persisted in his cruel and perverted conduct over almost four years. The complainer was caused to understand that she must remain silent. He was violent towards her over the period of his offending, and for years beyond, but charge 1 is not the direct focus of this appeal.

[41] If the Crown is to persuade us that the test set out in *Bell* is met for ground 1, challenging the prison term on charge 2, we would need to find that the sheriff imposed a sentence below the range a sheriff could reasonably have considered appropriate, applying her mind to all relevant features of the case. It is difficult to identify a range but the reported case with most similarity appears to be *B(C)* where a sentence of 4 years' imprisonment was imposed for offending that endured for 10 years. Whilst some features are worse in this case, notably the use of objects to penetrate and the physical and psychological consequences, others were worse in *B(C)*. These include: notably, that offending against the complainer on the charge subject to appeal began when she was 2 or 3 years of age; the 10-year period of the libel; the commission of such conduct in the presence of another child; and the commission of similar conduct against another daughter during an overlapping period. The sentence of 4 months' imprisonment imposed on charge 7 being consecutive brings the respective sentences closer together.

[42] Despite our view that the sentence on charge 2 was lenient, the sentence imposed in *B(C)* prevents us from concluding that it fell below the range reasonably open to the sheriff who understood the circumstances and considered what occurred on appeal in *B(C)*. Accordingly, we cannot find that the sentence on charge 2 was unduly lenient as proposed in the first ground of appeal and we refuse it.

[43] Turning to the second ground, senior counsel for the respondent conceded in the hearing that an SHPO for a duration of 10 years was appropriate if it referred to children under 16 years of age and contained a refinement such as that proposed by the Court of Appeal in *Smith.*

[44] We note that the respondent was 70 years old when he committed the crimes in charges 7 and 8, coinciding with our judicial experience that some male sex offenders

continue to offend in their advanced years. Charge 7 was a course of sexual assault and grooming designed to enable him to sexually abuse BB more seriously. Charge 8 was a further development in his campaign, albeit unsuccessful. Given his sexual offending against one child over several years in the 1980s, and his further grooming and sexual offending when he had access to another child in 2022, a girl of 13 and 14 years, we consider that the respondent has a propensity to abuse children sexually and that it remains active. It is necessary to protect the public, notably children and particularly adolescent and younger girls, from the considerable risk of sexual harm the respondent presents. The form of that harm is both contact sexual abuse and non-contact, sexual, electronic communications.

[45] Having invited and considered written submissions from parties on the terms of our proposed order, and still being persuaded that the order is necessary, we shall make a sexual harm prevention order under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 section 11(3)(a). We:

i) prohibit the respondent from having or attempting to have any contact or communication of any kind with any person under the age of 16 years save for incidental or unavoidable contact, unless supervised by an adult over the age of 18 and such adult is an adult who has official caring or parental responsibilities for the child;

ii) require the respondent to inform an officer of the Offender Management Unit responsible for managing him in terms of the Sexual Offences Act 2003, of any electronic devices he owns, uses or possesses capable of accessing the internet or communicating electronic messages;

iii) require the respondent to permit and facilitate the inspection of any such devices upon request by a police officer, including but not limited to, the provision of any user-names, passwords or other information necessary to enable them to do so;

iv) prohibit the respondent from deleting the internet browsing history of, or other records of calls, texts, messages or emails or any other communications on any such devices owned, possessed or used by him without the permission of an officer of the Offender Management Unit responsible for managing him in terms of the Sexual Offences Act 2003; and

v) prohibit the respondent from downloading, installing, activating or using any software or service designed to, or which has the effect of (a) preventing logs of internet access, web pages, records of calls, text messages, emails or other communication being preserved; (b) deleting the history of access to internet pages or other records of calls, texts messages, emails or other communications or (c) otherwise concealing specific internet web pages access, other records of calls, text messages, emails or other communications or (d) otherwise concealing specific internet web pages access, other records of calls, text messages, emails, or other communication on such devices that are owned, possessed or used by him;

vi) said order is for a period of 10 years."